No. 85-1538

Supreme Court, U.S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1985

GEORGE KATZ,

Petitioner,

-vs-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does a finding that a coconspirator statement is admissible under Fed.R.Evid. 801(d) (2) (E) automatically satisfy the requirements of the Confrontation Clause of the Sixth Amendment or must the statement meet the "reliability test" of *Ohio v. Roberts?*

2. Are hearsay statements of coconspirators regarding their efforts to avoid indictment and conviction by obstructing justice made after a defendant has retired from a RICO enterprise admissible against him?

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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

GEORGE KATZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petitioner George Katz respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this case on December 6, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit, affirming the opinion of the United States District Court, has not yet been reported.[1] A copy of the opinion is

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[1] PARTIES INVOLVED: In addition to parties to this Petition, the judgment of the United States Court of Appeals for the Third Circuit affected Joseph DePeri, James Martin, Dennis Linso, George Morrell, Henry Pecic and Theodore Murphy (Docket nos. 84-1566, 84-1571, 84-1577, 84-1578, 84-1579, 84-1594 and 84-1599). The Court below issued a single opinion and judgment incorporating all of these appeals. 1a-43a.

printed in the Appendix at 1a - 43a. The opinion of the United States District Court is printed in the Appendix filed with the Petition for Writ of Certiorari in the related case of *Henry Pecic v. United States*, which is incorporated herein. *Pecic* Appendix at 46a.

JURISDICTION

On December 6, 1985, the United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court. 42a-43a. A petition for rehearing with suggestion for rehearing *in banc* was denied on January 9, 1986. A copy of the judgment denying rehearing is reprinted in the Appendix at 46a. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, Sixth Amendment:

"In all prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him..."

UNITED STATES CODE, Title 18:

§1951. Interference with commerce by threats or violence.

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section--

• • •

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

§1962. Prohibited activities.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

STATEMENT OF THE CASE

Petitioner George Katz was found guilty of conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. Section 1962(d), a substantive RICO offense in violation of 18 U.S.C. Section 1962(c) and two counts of violating the Hobbs Act, 18 U.S.C. Section 1951. A count charging Katz with a third violation of the Hobbs Act was dismissed under Fed.R.Crim.P. 29(a). The six other defendants who stood trial with Katz were all convicted of the RICO conspiracy and substantive RICO counts and of all Hobbs Act violations against them. In addition, two of the defendants were charged with and convicted of various obstruction counts.[2]

In a superseding indictment, a federal grand jury alleged that the RICO conspiracy ran from January, 1980 to April, 1984. The defendants, former police officers of different rank and from different police divisions within the city, were charged with agreeing to conduct and participate in the conduct of the affairs of the "enterprise" through a pattern of racketeering activity which consisted of extortion and bribery of vice figures. The RICO "enterprise" was the Philadelphia Police Department.

Katz retired from the police department on March 14, 1983. The indictment alleged and the evidence demonstrated that his last criminal act and involvement in the RICO conspiracy occurred in November of 1982.

In January, 1984, ten months after Katz retired from the department, codefendant Martin was appointed Deputy Police Commissioner. Using his new authority, Martin created a special city-wide unit which he and his subordinates used to

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[2] Codefendant Martin was convicted of obstruction of a criminal investigation and of being an accessory after the fact of obstruction of a criminal investigation, 18 U.S.C. Sections 1503 and 1510; codefendant DePeri was convicted of obstruction of justice in violation of 18 U.S.C. Section 1503.

extort bribes. Shortly thereafter, one of Martin's former vice officers, Albert Ricci, was indicted and another, Joseph Alvaro, showed signs of concern. Martin then arranged to use some of his bribe money to buy Ricci's silence and to thwart the FBI investigation into his activities.

Unknown to Martin, Alvaro was cooperating with the government. He taped face-to-face and telephone conversations with the Deputy Commissioner and others. The tape recordings, made in early 1984, contained references to the corrupt operation in the Northwest Police Division formerly under Martin's leadership and then under codefendant DePeri, to Martin's use of the newly created unit to obstruct the federal investigation and to other defendants, including Katz, who had retired almost a year ago.

The government relied upon coconspirator declarations introduced through the testimony of Ricci and Alvaro and the tape recordings made by Alvaro in the spring of 1984. Katz was not a participant in any of the conversations.

Katz objected to the admissibility of these statements as violating Fed.R.Evid. 801(d) (2) (E) and the Confrontation Clause of the Sixth Amendment. Repeatedly, he urged the court to rule this evidence inadmissible at a joint trial, to grant him a severance or at least to instruct the jury not to consider such evidence against him. The trial judge denied these requests.

Neither Martin nor DePeri testified at their joint trial with the petitioner. Consequently, he was unable to confront them regarding statements they made to Ricci and Alvaro regarding him.

The district court ruled the statements admissible as coconspirator declarations under Fed.R.Evid. 801(d) (2) (E) without any inquiry into their reliability. It found that although Katz had retired from the police department long before the statements were made, he failed to prove he had withdrawn from the conspiracy. In other words, absent any proof that Katz

continued to engage in the conspiracy after his retirement, the district court concluded that he was an active participant in the conspiracy at the time of the conversations and on that basis alone admitted them.

Acknowledging that the introduction of these coconspirator statements was "the most serious issue" in the consolidated appeals of the defendants, 10a, the Third Circuit Court of Appeals noted that the district court should have made a specific finding that the petitioner and two codefendants who had also retired before the statements were made were part of the conspiracy at the time of the declarations. 33a. Nevertheless, it upheld the district court's admission of the statements without any reference to their trustworthiness.

In reaching its decision, the panel improperly measured the admissibility of the taped conversations by the standards used in determining whether a defendant made out a prima facie case of withdrawal from the conspiracy. In other words, despite the absence of any evidence of Katz's continued involvement in the conspiracy after his retirement, the appellate court affirmed the district court's finding that he was a member of the conspiracy at the time of the conversations because he had not established withdrawal from the conspiracy and summarily dismissed petitioner's Confrontation Clause claim. 34a-36a.

The taped conversations were essentially aimed at proving certain codefendants' efforts to coverup their complicity after Katz had been indicted and before they were charged in the superseding indictment. Katz maintained that these conversations were "not in futherance" of the conspiracy. Without discussing the holdings of this Court in *Lutwak v. United States*, 344 U.S. 604 (1953) and *Krulewitch v. United States*, 336 U.S. 440 (1949), the Third Circuit panel held that the statements were made in furtherance of the conspiracy because they were between coconspirators "apprising one another of their efforts to avoid indictment and conviction". 34a.

REASONS FOR GRANTING WRIT

I. THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS REGARDING THE RELATIONSHIP BETWEEN THE RULE OF COCONSPIRATOR STATEMENTS AND THE CONFRONTATION CLAUSE AND THE APPLICABILITY OF THE *OHIO V. ROBERTS* "RELIABILITY TEST" TO SUCH STATEMENTS.

Petitioner's case presents the Court the opportunity to settle the continuing conflict between the circuits regarding the relationship of the Confrontation Clause and the coconspirator provision of the Federal Rules of Evidence. The circuits are divided as to whether a finding that coconspirator declarations are admissible under Rule 801(d) (2) (E) of the Federal Rules of Evidence automatically satisfies the constitutional test of the Confrontation Clause. The First, Fourth, Seventh, Eighth and Tenth Circuits have held that it does. *United States v. Papia*, 560 F.2d 827, 836 n. 3 (7th Cir. 1977); *Ottomano v. United States*, 486 F.2d 269, 273 (1st Cir. 1972), *cert. denied*, 409 U.S. 1129 (1973); *United States v. Lurz*, 666 F.2d 69, 80-81 (4th Cir. 1981); *United States v. Nelson*, 603 F.2d 42, 46 (8th Cir. 1979); *United States v. Cox, 449 F.2d 679, 688-89 (10th Cir. 1971).* Other circuits have treated the inquiries as distinct, requiring a further confrontational analysis. *United States v. Perez*, 658 F.2d 654, 660 & n. 5 (9th Cir. 1981); *United States v. Wright*, 588 F.2d 31, 37-38 (2d Cir. 1978), *cert. denied*, 440 U.S. 917 (1979); *United States v. Peacock*, 654 F.2d 339, 349-50 & n. 1 (5th Cir. 1981).

In those circuits where the constitutional inquiry of admissibility is the same as the 801 inquiry, that is, where mere satisfaction of the requirements of the codified evidentiary rule is sufficient to obviate any Confrontation Clause analysis, there is an apparent conflict with the Court's decisions in *Dutton v. Evans*, 400 U.S. 86 (1970), where this Court refused to equate the Confrontation Clause and the evidentiary hearsay rule of

coconspirators' statements, and *Ohio v. Roberts*, 448 U.S. 56 (1980), which established a constitutional test for the admissibility of extrajudicial statements. Courts on both sides of the conflict cite *Dutton* in support of their respective positions. *Compare, Ottomano v. United States*, 438 F.2d at 273, and *United States v. Papia*, 560 F.2d at 836, n. 3, with *United States v. Perez*, 658 F.2d at 661 and *United States v. Wright*, 588 F.2d at 37-38. This confusion alone requires clarification from this Court.

The Confrontation Clause has never been construed to exclude all out-of-court statements in criminal trials. *Parker v. Randolph*, 442 U.S. 62 (1979); *Dutton v. Evans*, 400 U.S. 74, 80 (1970). Nevertheless, it imposes requirements more stringent than the hearsay exceptions. *Ohio v. Roberts*, 448 U.S. at 63-65. While identifying restrictions which the Confrontation Clause places upon the use of hearsay evidence, this Court permits the introduction of such evidence only where it meets the "indicia of reliability" test. *Ohio v. Roberts*, 448 at 67. Thus, to satisfy constitutional concerns of the Confrontation Clause, *Roberts* requires the trial court to probe into the reliability of the hearsay to determine its trustworthiness before admitting it.

If qualification of a coconspirator statement under Fed.R.Evid. 801(d) (2) (E) alone is sufficient to meet constitutional requirements as it is in several circuits, there is no need to apply the *Roberts* "indicia of reliability" test. Therefore, it is necessary for this Court to address the question whether a trial court must conduct a reliability inquiry to determine the trustworthiness of coconspirator statements to comport with constitutional requirements or whether all coconspirator statements shall be deemed trustworthy without any such inquiry as long as they qualify under Rule 801(d) (2) (E).

Compounding the confusion is this Court's statement in *Roberts* that "reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception". 448 U.S. at 66. The Court did not specify what these "firmly rooted" exceptions were.

Is a coconspirator statement such an exception? Again, the circuits are split. For example, the Third Circuit has determined that it is not, defining it as an admission and not hearsay at all. *United States v. Ammar*, 714 F.2d 238, 255 (3d. Cir. 1983). The Fifth Circuit inferred reliability of coconspirator statements because they fell within a "firmly rooted hearsay exception". *United States v. Peacock, supra* at 349.

The Third Circuit opinion in this case speaks of a *Bruton* problem which it dismisses an inapplicable.[3] It notes that *Bruton v. United States*, 391 U.S. 123 (1963), was concerned with hearsay evidence against a codefendant. The appellate court distinguished the coconspirator statements as an exception to the hearsay rule. No "reliability test" was applied despite its own rule set forth in *Ammar, supra* at 255-56. Thus, it impliedly concluded that their admission under the Fed.R.Evid. 801(d) (2) (E) satisfied the necessities of the Confrontation Clause.

This case enables the Court to clarify the legal standard governing the admissibility of coconspirator statements in light of the development of confrontational analysis begun in *Dutton* and continued in *Roberts*. It provides the opportunity to clarify whether a coconspirator's statement automatically satisfies the requirements of the Confrontation Clause because it is admissible under Fed.R.Evid. 801(d) (2) (E) without subjecting it to any *Roberts* "reliability test". A statement by this Court is necessary to settle the conflict among the circuits and to close the open-ended rule of *Dutton* and *Roberts*.

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[3] The Third Circuit's opinion refers to the Confrontation claim as being made by appellants Morrell and Murphy. However, petitioner specifically raised the issue in the district court; and, pursuant to Rule 28(i) of the Federal Rules of Appellate Procedure, he joined in and adopted by reference those parts of the other appellants' briefs on this issue. Thus, petitioner's claim is properly before this Court.

II. THE THIRD CIRCUIT'S HOLDING THAT COCONSPIRATORS' STATEMENTS APPRISING ONE ANOTHER OF EFFORTS TO AVOID INDICTMENT AND CONVICTION ARE ADMISSIBLE CONFLICTS WITH AND IGNORES THIS COURT'S DECISIONS.

Despite this Court's unequivocal rule that out-of-court declarations made during the concealment phase of the conspiracy do not fall within the coconspirator exception to the hearsay rule, *Dutton v. Evans*, 400 U.S. 74, 81 (1970); *Lutwak v. United States*, 344 U.S. 604 (1953); *Krulewitch v. United States*, 336 U.S. 440 (1949), the Third Circuit held that "conversations between members of the conspiracy apprising one another of their efforts to avoid indictment and conviction" were statements made "in furtherance of the conspiracy". 34a. This holding is clearly erroneous and departs from this Court's holdings.

Petitioner, in addition to challenging all coconspirator statements as discussed earlier in this Petition, argued that certain tape recordings between codefendants and government witnesses were inadmissible against him because they were made after he had withdrawn from the RICO "enterprise" when he retired from the police department and because they were not made "in furtherance of the conspiracy". The district court found that petitioner's retirement did not establish withdrawal and it did not address the "not in furtherance of the conspiracy" issue.

The conversations not only took place long after Katz had left the police department but also involved acts of concealment by others which occurred after his retirement. Statements made during the concealment phase are inadmissible unless they form a part of the crime itself. *Lutwak v. United States*, 344 U.S. 604 (1953); *Krulewitch v. United States*, 336 U.S. 440 (1949). Here, while the statements may have been inadmissible against Martin and DePeri on the obstruction counts, they were not as to Katz who was not charged with obstruction.

In *Krulewitch*, the government urged this Court to recognize that conspirators always agree to conceal facts in order to prevent detection and statements made to accomplish this end are part of the conspiracy. The Court rejected this position, saying "We are not persuaded to adopt the government's implicit conspiracy theory which in all criminal conspiracy cases would create automatically a further breach of the general rule against the admission of hearsay evidence". *Krulewitch v. United States, supra* at 444.

When statements relating to concealing evidence of the conspiracy are admitted, the "court must be careful at the time of the admission and by its instructions to make clear the evidence is limited as against the declarant only". *Lutwak v. United States, supra* at 618. The district court gave no instruction, leaving the jury to consider the conversations against all of the defendants.

The opinion below ignores this Court's refusal to extend the hearsay exception to include out-of-court statements made during the concealment phase of a conspiracy. *See, Dutton v. Evans, supra* at 81. Because the opinion conflicts with *Lutwak* and *Krulewitch*, it must be corrected by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit Court of Appeals.

Respectfully submitted,

s/T.J.S.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-1566, 84-1571, 84-1577, 84-1578,
84-1579, 84-1594, 84-1599

UNITED STATES OF AMERICA

vs.

DE PERI, JOSEPH

Joseph DePeri, Appellant in 84-1566

UNITED STATES OF AMERICA

vs.

MARTIN, JAMES

James Martin, Appellant in 84-1571

UNITED STATES OF AMERICA

vs.

LINSO, DENNIS

Dennis Linso, Appellant in 84-1577

UNITED STATES OF AMERICA

vs.

MORRELL, GEORGE

George Morrell, Appellant in 84-1578

UNITED STATES OF AMERICA

vs.

PECIC, HENRY

Henry Pecic, Appellant in 84-1579

2

UNITED STATES OF AMERICA

vs.

MURPHY, THEODORE

Theodore Murphy, Appellant in 84-1594

UNITED STATES OF AMERICA

vs.

KATZ, GEORGE

George Katz, Appellant in 84-1599

On Appeal from the United States
District Court for the
Eastern District of Pennsylvania
D.C. Criminal Nos. 84-00106-02, 84-00106-01A,
84-00106-03, 84-00106-04, 84-00106-05,
84-00106-06, 84-00106-07

Argued October 15, 1985

Before: ADAMS, HUNTER, *Circuit Judges*, and
STERN,* *District Judge*

Opinion filed December 6, 1985

---

*Honorable Herbert Stern, United States District Judge for the District of New Jersey, sitting by designation.

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OPINION OF THE COURT

HUNTER, *Circuit Judge:*

1. This case arises from a tragic chapter in the history of the Philadelphia Police Department dealing with conspiracy to extort protection money from video poker machine gambling operations and "numbers writers." In the spring of 1984, the grand jury investigating these activities issued an eighty-six count indictment against fifteen police officers,

including a Deputy Commissioner and a Chief Inspector. For management purposes, the District Court for the Eastern District of Pennsylvania ordered the severance of the defendants into two groups. Trial in this case dealing with the first group commenced on July 9, 1984.[1] On August 10, 1984, the jury returned a guilty verdict against the defendants on all submitted counts.[2] The trial court sentenced the defendants to prison terms of varying length. Deputy Commissioner Martin received eighteen years; Chief Inspector DePeri, fifteen years; Pecic, twelve years; Murphy, ten years; eight each for Linso and Katz; and Morrell received three. Defendants appeal their convictions and sentences for violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(d) (1982), the Hobbs Act, 18 U.S.C. § 1951 (1982), and obstruction of justice, 18 U.S.C. §§ 1503, 1510 (1982). For the reasons discussed below, we affirm.

I.

A. The Indictment and Trial

2. On May 3, 1984, a federal grand jury returned a multiple count indictment against fifteen officers and former officers of the Philadelphia Police Department charging participation in a conspiracy to extort and extortion of protection money from video poker machine and illegal numbers lotteries operators.

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1. The trial of the second group of defendants commenced on November 5, 1984. Three of these defendants were acquitted by the jury; one pled guilty of conspiracy and participation in a RICO enterprise and to a Hobbs Act violation; and the jury returned a guilty verdict against the remaining three. Sentencing is still pending against the remaining defendant who entered a guilty plea.

2. At the close of the government's case, the court dismissed two counts charging Hobbs Act violations.

Count One of the indictment charged each defendant with conspiracy, racketeering, and extortion. Count Two charged each defendant with a substantive RICO violation. Counts Three, Four, and Five charged Police Department Deputy Commissioner James Martin with obstructing a criminal investigation by paying hush money to Northwest Division Vice Unit Officer Albert Ricci. Counts Six and Seven charged Martin and Joseph DePeri, a Police Department Chief Inspector, with obstructing justice by ordering the destruction of records concerning the extorted payments. Counts Eight through Eighty-six charged the defendants with Hobbs Act extortion.

3. At trial, the evidence centered on the defendants' activities in the Northwest Division from late 1979 to April 1984. The government's case included the testimony of Albert Ricci, former Northwest Division Vice Lieutenant Joseph Alvaro, and the victims of the extortion scheme. Alvaro, who reported directly to DePeri while the latter served as the Northwest Divison's Inspector, was the government's key witness. Alvaro's testimony detailed how the extortion money was passed up the ranks from the bagmen to the Northwest Division's Inspector. In addition to Ricci's and Alvaro's testimony, the government introduced tape recordings of face-to-face and telephone conversations, primarily between Alvaro and Martin, DePeri, and Ricci.

B. The Appellants

4. The Philadelphia Police Department is organized into geographic divisions, with each division composed of approximately two districts. Each division also contains a vice unit charged with investigating violations of the city's and Pennsylvania's vice laws, including illicit gambling. Until 1980, Harry Pecic was the vice lieutenant in the Northwest Division. In late

1979, the evidence shows that Pecic began to extort protection payments from numbers writers and video poker machine operators. After he was transferred to another division, Pecic met with Alvaro at Inspector DePeri's request and provided Alvaro with the list of protected numbers and poker machine establishments located in the Northwest Division. DePeri also told Alvaro to use the code name "Whitey" to identify himself to the operators when he collected the money.

5. Joseph DePeri was appointed Inspector of the Northwest Division in December, 1980. DePeri selected Joseph Alvaro as his vice lieutenant to replace Pecic after DePeri's first choice for vice lieutenant, defendant George Katz, was rejected by the Police Commissioner. Alvaro testified that DePeri discussed collecting the protection money with him, and instructed Alvaro to build up the collection list and to pick one of the members of his vice squad as the bagman.

6. Alvaro chose Albert Ricci to be the bagman. With the list of protected locations provided by Pecic, Ricci collected payments from old clients and expanded the scheme by adding new ones, primarily video machine vendors, to the list. The evidence shows that Ricci increased business by seizing unprotected poker machines and transporting them to Northwest Division Headquarters. Ricci would then hook the vendors into the scheme by offering to sell the machines back to them with the understanding they could continue to use the machines for gambling if Ricci received a monthly stipend of fifty to one hundred dollars per machine. Ricci would collect the payments twice a month and would pass the payments to Alvaro, who in turn passed approximately two-thirds of the money to DePeri. Alvaro managed the extortion scheme, comparing notes with Ricci to ensure that all the victims had paid up before Alvaro delivered the money to DePeri. Eventually, the protection scheme

expanded to the point where Ricci's share of the collection increased from three hundred to fifteen hundred dollars per month, out of a gross of six thousand dollars per month.

7. George Katz, DePeri's first choice for Alvaro's slot, remained a lieutenant in the North Division. Alvaro testified that DePeri instructed him to allow Katz to collect some protection payments in the Northwest Division "to give George Katz an opportunity to make a few dollars for himself."

8. The Northwest Division contains two districts, the Fifth and the Thirty-ninth. Captain Dennis Linso commanded the Northwest Division's Fifth Division where Officer George Morrell worked as a patrolman. Alvaro and Ricci testified that Linso also extorted protection payments, employing Morrell as his bagman.

9. Lieutenant Theodore Murphy commanded the Southwest Division's vice unit. Alvaro testified that Murphy had called him to inquire as to whether Alvaro received protection money from a certain vendor. Donald Devore, a video game vendor, testified that he paid protection money directly to Murphy. William Dawley, also a video game vendor with machines in the Southwest Division, testified that he paid protection money to Central Division Inspector John DeBenedetto, an unindicted coconspirator. This money was later transferred to the Southwest Division. Dawley also testified that he had met with Murphy on one occasion to verify the locations of Dawley's video poker machines.

10. James Martin entered the conspiracy when he served as Night Command Inspector, working in the office across the hall from Inspector DePeri. Martin began collecting protection money from Lester Barry, a numbers writer, in early 1982. When DePeri was appointed Chief Inspector in June, 1982, Martin was

promoted to Northwest Division Inspector. Despite this change in personnel, the extortion scheme proceeded uninterrupted: Ricci continued to pass the money to Alvaro, who then gave it to Martin. After Alvaro was promoted to Captain in the Police Radio Division in July, 1982, Ricci testified that he delivered the payments directly to Martin. Martin remained at the Northwest Division until November, 1983, when he was appointed Deputy Commissioner.

C. The Investigation and Attempted Cover-up

11. In November, 1982, a federal grand jury served subpoenas for the contents of certain Central Division officers' desks, including Inspector DeBenedetto's.[3] Learning of this, Chief Inspector DePeri called Captain Alvaro at Police Radio, and instructed him to destroy the two copies of the poker machine payoff list kept at Northwest Division Headquarters. Alvaro returned to the headquarters, broke into Martin's desk, and retrieved Martin's poker machine payoff list. Alvaro also searched Ricci's desk and found Ricci's copy of the payoff list along with some of the extorted funds. After returning the money to Ricci, Alvaro went home and burned both payoff lists.

12. Once Alvaro began cooperating with the federal investigation, he recorded conversations with DePeri and Martin concerning the destruction of the lists. During a conversation with Martin, Alvaro expressed his concern that the grand jury would infer that he had retrieved and destroyed the payoff papers in Martin's desk. In response, Martin indicated his willingness to testify before the grand jury that he had ordered Alvaro to break into his desk to retrieve his

3. As a result of this earlier investigation, DeBenedetto was tried and sentenced to eight years in prison for extortion on August 1, 1983.

own papers. In another conversation, after observing that Ricci had been indicted by the grand jury, Martin told Alvaro that he would be able to raise the money to cover Ricci's back taxes and legal expenses to repay Ricci for "going to bat" for him.

13. According to the government, the investigation produced evidence of a city-wide conspiracy, unbounded by any particular police division. Although the defendants in this consolidated appeal were all connected to the scheme through the Northwest Division, the government took the position at trial that the evidence established that protection money was passed vertically within the Northwest Division and laterally between divisions.

II.

14. Appellants raise a plethora of issues in this appeal, most of which deal with the discretionary authority of the trial court in ruling on evidentiary matters. Many of these issues affect all of the defendants, but most affect only a few and some are raised by only one of the seven. Most of the issues involve the straight-forward application of settled legal principles. Consequently, we will abbreviate much of our discussion. We believe that the most serious issue in this appeal concerns the the introduction of coconspirators' statements against some of the appellants, particularly those statements contained in the taped conversations between Alvaro and Martin and Alvarc and DePeri. Although there is a great deal of overlap in many of the issues raised, we will discuss the questions raised by each appellant in the order in which they are listed in this appeal.

A. Claims Initially Raised by DePeri

Pre-trial Publicity and the Denial of the Jury Sequestration Motion

15. DePeri, Pecic, and Murphy argue that the extensive pre-trial publicity surrounding the scandal biased the jury and deprived them of a fair trial. In particular, appellants complain that a series of articles that appeared in *The Philadelphia Inquirer*'s Sunday magazine supplement entitled "Cops on the Take," describing a related extortion scheme irrevocably tainted the trial. Appellants claim that because jury selection convened on July 9, 1984, one day after the second installment in the *Inquirer* series appeared, and because the majority of the prospective jurors questioned by the court admitted some knowledge of related extortion schemes, appellants were deprived of their right to a fair trial.

16. The district court's *voir dire* spanned four days, during which the court individually examined eighty-one jurors on the extent of their exposure to the case and the degree to which they had formed an opinion concerning the officers' conduct. Although seven of the jurors who deliberated and returned the guilty verdicts admitted that they had been exposed to the publicity surrounding the case, and two admitted to familiarity with the *Inquirer* series, we believe that the trial court's exhaustive *voir dire* ensured that appellants were not deprived of their sixth amendment right to a fair trial decided by "a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

17. *Voir dire* is conducted under the supervision of the trial court and is left to its sound discretion. *See*

Ristaino v. Ross, 424 U.S. 589, 594 (1976). In a case involving extensive and allegedly inflammatory pre-trial publicity, we will only find that the trial court abused its discretion when appellants demonstrate clearly that the jurors possessed "such fixed opinions that they could not judge impartially the guilt of the defendant." *Patton v. Yount*, 104 S.Ct. 2885, 2891 (1984), *citing Irvin*, 366 U.S. at 723. It is the rare case in which adverse pretrial publicity will create a presumption of prejudice that overrides the jurors' assurance that they can be impartial. *See United States v. Provenzano*, 620 F.2d 985, 995 (3d Cir.), *cert. denied*, 449 U. S. 899 (1980). The mere fact that community members are cognizant of the crimes and of the defendants' identities does not, by itself, render the trial constitutionally unfair. *See Dobert v. Florida*, 432 U.S. 282, 303 (1977). Instead, we must examine the totality of the circumstances surrounding the trial for the conjunction of extensive and inflammatory publicity immediately prior to trial, evidence of the community's outrage at the revelation of the crimes, and clear indications of juror partiality on the record, before we can reverse the trial court's finding of jury impartiality for manifest error. *See Yount*, 104 S.Ct. at 2889-90; *Irvin*, 366 U.S. at 723, 728. *Cf. Murphy v. Florida*, 421 U.S. 794, 800 (1975).

18. Our review of the circumstances surrounding the trial leads us to conclude that the court did not abuse its discretion. Although the pre-trial publicity was extensive, and there was no "cooling off" period between the publicity and trial as in *Yount*, we find a lack of inflammatory, sensational journalism that would lead us to question the jury's impartiality. Moreover, the *Inquirer* articles only indirectly concerned appellants. Only one defendant, Martin, is mentioned, and then only in passing. The articles detail a structurally similar but apparently separate

extortion scheme conducted in the Central Division by Inspector DeBenedetto. Nor do we discern an overpowering sense of outrage in the community or evidence of juror partiality in the record. Appellants fail to bring to our attention any portion of the *voir dire* that indicates that *any* juror had made up his mind with regard to the merits of the government's case. Further, we note that ten jurors were seated without challenge by appellants. As to these ten, whether or not exposed to the pre-trial publicity, failure to challenge generally waives defendants' objections on appeal. *See Provenzano*, 620 F.2d at 996 n.15. Concerning the two jurors who were seated over defendants' challenges, our review of the record shows that the trial court's careful *voir dire* established that at most, the jurors were aware of the scandal, but could not recall more than the fact that "there were some policemen indicted for racketeering." The court properly determined that these jurors had not made up their minds as to the guilt or innocence of any of the defendants and that they would be impartial.

19. This is the second time we have had the opportunity to review the *voir dire* proceedings in this case, and we reaffirm our approval of the trial court's conduct. In *United States v. Martin*, 746 F.2d 964, 973 (3d Cir. 1984), we commended the trial court's "patient and careful examination of potential jurors . . . [as] an excellent example of the power of *voir dire* to screen out persons who may not be impartial." The record shows the district court's acute sensitivity to the problems generated by the public profile of this case. That the jurors were familiar with the broadest details of the scheme was inevitable from the publicity surrounding the trial; that the jurors ultimately impanelled provided defendants with a fair trial is due entirely to the skill of the trial judge in conducting a searching and effective *voir dire*.

20. Pecic argues that the district court abused its discretion in denying his motion to sequester the jury during the trial and during its deliberations. The decision whether to sequester the jury lies wholly within the discretion of the district court. As the district court observed when it denied defendants' post-trial motions, "sequestration is an extreme measure, 'one of the most burdensome tools of the many available to assure a fair trial.'" *quoting United States v. Porcaro*, 648 F.2d 753, 755 (1st Cir. 1981). In light of the trial court's instructions to refrain from reading, viewing television, or listening to the radio reports about the case, the court's daily examination of the jurors to determine if they were following this instruction, and the circumstances and the length of the trial, we find no abuse.

Exclusion of Evidence Concerning DePeri's Attitude Towards Children

21. Alvaro testified to attending a meeting between Inspector DePeri and poker machine vendor Joseph Lamarra in which DePeri told LaMarra "that if anybody ever squealed on him, he would kill his f-----g kids." In an attempt to rebut this testimony, DePeri tried to introduce testimony that he had suffered a severe trauma when a school bus killed his child more than ten years ago. According to DePeri, the effects of this trauma made it unlikely that DePeri would threaten the life of any child. This testimony would also show that "children were very dear to DePeri and that he took a special interest in the children of the people under his command" and that DePeri had organized charitable collections for children. DePeri argued that this evidence would undercut Alvaro's testimony by showing that it was inconsistent with DePeri's high regard for the welfare of children. The court declined to accept this argument, however, and excluded the

evidence under Federal Rules of Evidence 401 and 403 as irrelevant and prejudicial.

22. We believe that the district court did not abuse its discretion in excluding this evidence. DePeri's state of mind regarding children in general does not make his statement to LaMarra "more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Moreover, the evidence appears to be an effort to evoke the jury's sympathy toward DePeri by introducing an account of DePeri's misfortunes. We hold therefore that the court properly found DePeri's proffer of evidence irrelevant and prejudicial.

Introduction into Evidence of Officer Molloy's Testimony

23. Lawrence Molloy was a Philadelphia police officer formerly assigned to the Central Division. Molloy was indicted in 1983 and subsequently convicted on charges of accepting illegal protection payoffs. At appellants' trial, Molloy testified concerning the collection and distribution of protection payments from numbers writers and video poker machine vendors in the Central Division. In the course of his testimony, Molloy indicated that he presently resided at a halfway house in Camden, New Jersey, and had been convicted for extortion. Molloy also testified that he did not know any of the appellants.

24. DePeri and Martin argue that the court erred in admitting Molloy's testimony. They contend that Molloy's testimony was irrelevant because it did not concern the extortion scheme in the Northwest Division and that the court should have excluded the testimony as prejudicial under Federal Rule of Evidence 403 because of Molloy's conviction on charges similar to the charges brought against appellants. We will reverse the district court's decision to admit

Molloy's testimony only if appellants demonstrate that the ruling was "arbitrary or irrational." *United States v. Friedland*, 660 F.2d 919, 929 (3d Cir. 1981), *cert. denied*, 456 U.S. 989 (1982). Our review of the record leads us to conclude that the court's decision was neither arbitrary nor irrational. Molloy's testimony was probative of the defendants' alleged use of the Philadelphia Police Department as a vehicle to collect and distribute the protection payments. Molloy testified that he received payoffs from vendors who had poker machines "all over the city," and, more importantly, collected payments for machines that were not located in the Central Division. This money was funneled directly to Inspector DeBenedetto of the Central Division. Alvaro later testifed that he contacted DeBenedetto to receive payoffs collected by DeBenedetto's men from vendors with machines located in the Northwest Division. This evidence revealed that the defendants' extortion activities were not limited to the Northwest Division, and that the defendants used the services of other divisions to help collect protection money, as the indictment charged.

Improper Prosecutorial Comments

25. DePeri, Pecic, and Murphy assert that the government prejudiced their trial by informing the jury that its witnesses had passed polygraph examinations. This statement allegedly occurred during the following exchange between the government and Captain Linso:

> Q. Is it your testimony that [certain poker machine vendors] did not pay you or any representative of you for any poker machines?
>
> A. That is exactly my testimony and they didn't take a lie detector test either like I wanted to do.

> The Government: Your Honor, I would ask that that be striken.
>
> Mr. Tinari: Objection.
>
> The Court: Sustained.
>
> The Government: It's also untrue.
>
> Mr. Tinari: That is objected to. I move for a mistrial.
>
> The Court: Denied. The jury will disregard Mr. Klein's comment and the jury will disregard this witness's answer to which I have sustained an objection and give no consideration to these matters in any way. Shall we continue?

According to appellants, the prosecutor's remark that Linso's statement was "also untrue" constituted impermissible vouching for the credibility of its witnesses, the poker machine vendors. While we agree that the government's statement was improper, we hold that even if the statement constituted error, the error is harmless and did not require the court to grant the mistrial motion. *See United States v. Hastings*, 461 U.S. 499, 509 (1983). Under *United States v. DiPasquale*, 740 F.2d 1282, 1296-97 (3d Cir. 1984), *cert. denied*, 105 S. Ct. 1226 (1985), we must examine the record as a whole to ascertain whether the error prejudiced defendant's trial, such that within the setting of the trial, the error was "so insignificant and unimportant" that it may be deemed harmless. *See Chapman v. California*, 386 U.S. 18, 22 (1967). The record shows that this comment is ambiguous. The government did not state that its witnesses had taken polygraph exams, it stated only that Linso's statement was "untrue," which could have also meant that Linso

did not take a lie detector test. The record also shows that the government's remark was isolated, that the prejudice, if any, to the defendants was minimal, especially in light of the court's prompt corrective instruction, and that the evidence against appellants was strong.

Variance Allegations

26. DePeri, Linso, Pecic, and Katz maintain that the indictment impermissibly varied from the proof at trial. Appellants contend that while the indictment charged a single conspiracy, the proof supported only a finding of "ad hoc associations of various officers." Essentially, they argue that the government failed to show their association to each other within the RICO enterprise charged, the Philadelphia Police Department, in sufficient detail to permit their conviction.

27. The burden on the government under RICO was to show that the defendants knowingly agreed to participate in the RICO conspiracy. *See United States v. Jannotti*, 729 F.2d 213, 226 (3d Cir.), *cert. denied*, 105 S. Ct. 243 (1984). In *Jannotti*, we observed that

> 'The mere fact that a defendant works for a legitimate enterprise and commits racketeering acts while on the business premises does not establish that the affairs of the enterprise have been conducted "through" a pattern of racketeering activity' . . . . Instead, the government must show that a person 'is enabled to commit the predicate offenses solely by virtue of his position in the enterprise; or . . . the predicate offenses are related to the activities of that enterprise.'

Id. (citations deleted). The evidence at trial established that the defendants' positions in the Philadelphia

Police Department enabled them to collect and distribute protection profits, contact and involve new clients in the racket, and enforce the extortion scheme. The evidence presented to the jury would have allowed it to conclude that the defendants "knowingly agreed to participate in the 'enterprise' through a pattern of racketeering." *United States v. Riccobene*, 709 F.2d 214, 221 (3d Cir.), *cert. denied*, 104 S. Ct. 157 (1983).

28. In reviewing the jury's finding that the defendants were involved in a single enterprise, we must determine if there is sufficient evidence, viewed in the light most favorable to the government, to support its finding. *See Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Fischbach & Moore, Inc.*, 750 F.2d 1183, 1189 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 1397 (1985); *United States v. Leon*, 739 F.2d 885, 890-91 (3d Cir. 1984); *United States v. Provenzano*, 620 F.2d 985, 999 (3d Cir.), *cert. denied*, 449 U.S. 889 (1980). A review of the record compels us to hold that the evidence sufficed to link these defendants to the conspiracy and establish RICO liability. In *United States v. Maker*, 751 F.2d 614, 625 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 3479 (1985), we observed that a single scheme is demonstrated when "the evidence shows a common goal, operations carried out in virtually identical manner, and an overlapping of defendants." All three factors are present in this case. The common goal was the extortion of poker machine vendors and numbers parlors; the method of extortion in all cases was similar--the machines would be seized and sold back to the operators for the same price, the protection money ranged between fifty and one hundred dollars per machine in all areas, the victims payed on the first or fifteenth of the month, there was a common code name ("Whitey") that was passed on to the bagmen, the money was collected and passed "up the ladder" to the Inspectors (Central Division

Inspector John DeBenedetto, Northwest Division Inspectors DePeri and Martin); and the defendants, although stationed in different divisions, came into contact with one another in the course of dividing the profits from and enforcing the protection scheme.

29. DePeri, Murphy, and Katz claim they could not have participated in a single conspiracy because they did not know the identities of all of the other participants nor were they aware of the overarching conspiracy. This knowledge is not essential to the finding of a RICO conspiracy. As we said in *Riccobene*, "[i]t is well established that one conspirator need not know the identities of all his coconspirators, nor be aware of all the details of the conspiracy in order to be found to have agreed to participate in it." 709 F.2d at 225. The government proved that the defendants understood the essential nature of the plan and knowingly agreed to participate in the plan, which is sufficient for RICO liability. *See id.*

Open Court Statement by a News Reporter

30. DePeri, Pecic, and Murphy argue that the statement by a *Philadelphia Inquirer* reporter in the courtroom before the jury concerning the poor sound quality of tape recorded conversations played before the court prejudiced their trial by alerting the jury to the high profile of the case. While the court listened to Alvaro and Ricci discuss the latter's job prospects after his extortion indictment, the following exchange took place:

> The Court: Can the sound be turned up at this point for the audience?
>
> Mr. Weiner: My name is Tim Weiner. I work for the Philadelphia Inquirer.

> Mr. Lazin: Is this something that is appropriate to be heard in front of the jury? I have an idea what he is going to say.
>
> The Court: I think what he is going to say [sic], we will let the jury stay in the courtroom.
>
> Mr. Weiner: For the purposes of the record, one of the two speakers, the one on the right, is in open pain, and the sound and signals emanating from the one on the left is unintelligibile, utterly unintelligible, to the audience and members of the press and the public without the aid of the transcript. For the purposes of the record, we would respectfully ask after the playing of the tape is completed, that your Honor delay further playing of the tapes until counsel may be heard on this matter. We are here as the eyes and ears of the public on a matter of great public importance and we cannot function under these conditions. Thank you.

The court directed a technician to resolve on the problem and ruled that the press could read copies of the tape transcripts during lunch recesses. The court then excused the jury, and a number of other reporters registered complaints with the court, *e.g.*, that they were not able to make copies of the transcripts or the tapes. The defendants moved for mistrial, again out of hearing of the jury, on the ground that the jury's verdict would be influenced by their knowledge of the trial's public interest. The court denied the motions. When the jury returned, the court gave a corrective instruction admonishing them to ignore to the reporter's remarks.

31. This third party communication with the jury would be considered objectionable and provide sufficient grounds to overturn the verdict if it can be shown that it violated the sixth amendment's guarantees, *e.g.*, if the statement somehow calls the jury's impartiality into question, or deprives the defendant of his rights of confrontation and counsel. *See Government of Virgin Islands v. Gereau*, 523 F.2d 140, 150-51 (3d Cir. 1975), *cert. denied*, 424 U.S. 917 (1976).

32. In this context, the reporter's statement neither biased the jury against the defendants nor did it provide the jury with novel information concerning the public's interest in the trial. Given the lack of prejudice and the court's prompt corrective instruction, we find no error.

Agent Gamber's Reports

33. DePeri argues that the court erred by refusing to allow him to introduce into evidence reports completed by Federal Bureau of Investigation Agent Gamber detailing his interviews with video poker machine vendors LaMarra and Cook. DePeri claims that these reports contained statements by LaMarra and Cook that would have impeached part of Alvaro's testimony and argues that the court should have admitted the interviews under the business records exception to the hearsay rule.

34. We disagree. The applicable rule here is Federal Rule of Evidence 803(8), the public records exception to the hearsay rule. Although this rule generally permits the introduction of public records into evidence by either party in a civil proceeding, subdivision (B) prevents the introduction of law enforcement reports against defendants in criminal cases. *See United States v. Grady*, 544 F.2d 598, 604

(2d Cir. 1976). Unlike subdivision (C) dealing with factual findings resulting from official, non-law enforcement investigations, subdivision (B) does not provide explicitly for the introduction of police reports into evidence against the government. In *United States v. Smith*, 521 F.2d 957 (D.C. Cir. 1975), the court reasoned that subdivision (B) "should be read in accordance with the obvious intent of Congress and in harmony with 803(8)(C) to authorize the admission of the reports of police officers and other law enforcement personnel at the request of the defendant in a criminal case." 521 F.2d at 968 n.24. Even under this reading of subdivision (B), the court correctly denied DePeri's request. This is a classic "hearsay within hearsay" problem. While Rule 803(8)(B) would permit DePeri's introduction of the reports themselves, which would ordinarily be considered hearsay, LaMarra's and Cook's out-of-court statements contained in the records require a separate hearsay exception before they can be admitted. Because DePeri did not provide the court with an applicable hearsay exception to allow the introduction of LaMarra's and Cook's statements, we hold that the court did not err in refusing to admit Agent Gamber's reports.

B. Claims Initially Raised by Martin

Admission of Tape Recorded Conversation between Ricci and Alvaro

35. At trial, Albert Ricci testified to handing an envelope containing ten thousand dollars in protection money directly to James Martin. On re-direct examination, to rebut defense counsel's implied charge that Ricci constructed this story as a bargaining chip when Ricci sought immunity from prosecution, the government played a tape recorded conversation between Ricci and Alvaro where Ricci states that he

passed the money to Martin. The court admitted the statement under Federal Rule of Evidence 801(d)(1)(b), which excludes from the definition of hearsay prior statements where "[t]he declarant testifies at the trial . . . and the statement is . . . consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication." When Alvaro made the tape, Ricci was unaware of the fact that this conversation was being recorded, and had not yet decided to inform the United States Attorney about his involvement in the protection scheme. On appeal, Martin suggests that because Ricci knew that he was a target of the grand jury investigation, Ricci had a motive to falsify his story to Alvaro, and consequently, the court erred in admitting Ricci's prior consistent statement.

36. The timing of consistent prior statements divides the courts of appeals. *Compare United States v. Quinto*, 582 F.2d 224, 234 (2d Cir. 1978) (reversing conviction when prior consistent statement made after the motive to falsify arose), *with United States v. Parodi*, 703 F.2d 768, 784-85 (4th Cir. 1983) (prior existence of motive to fabricate does not render the prior consistent statement inadmissible). We find it unnecessary to enter this debate here, as Martin fails to support his assertion with any evidence. The record, fairly read, indicates that Ricci addressed Alvaro as his former commanding officer, a coconspirator, and had no idea that the conversation would be of any value to him in the future. That Ricci's recorded statements are inculpatory, not exculpatory, evidences a lack of guile that supports the interpretation that the conversation occurred before Ricci decided to talk to the prosecutors. *See United States v. Roher*, 708 F.2d 429, 433 (9th Cir. 1983). In sum, we cannot discern a motive to falsify arising prior to the conversation, and

therefore find no error in the court's admission of the tape.

Alvaro's Interpretation of Martin's Recorded Statements

37. Martin argues that the trial court abused its discretion in allowing Alvaro to testify as to his understanding of tape recorded conversations between Alvaro and Martin. Under Federal Rule of Evidence 701, lay witnesses may state their understanding of the use of another person's statements "only if rationally based on the perception of a witness and helpful either to an understanding of the testimony of the witness on the stand or to the determination of a fact in issue." *United States v. Cox*, 633 F.2d 871, 875 (9th Cir. 1980), *cert. denied*, 454 U.S. 844 (1981). Martin's language on the tapes is sharp and abbreviated, composed with unfinished sentences and punctuated with ambiguous references to events that are clear only to Martin and his audience. To the uninitiated listener, Martin speaks as if he were using code. Alvaro's opinions are based upon his direct perception of the event, are not speculative, and are helpful to the determination of Martin's involvement in the protection scheme and the subsequent attempt to silence Ricci with "hush money." Moreover, the trial court vigorously policed the government's examination of Alvaro to ensure that he was not asked to interpret relatively clear statements. Under these circumstances, we find that the court did not abuse its discretion.

Sufficiency of Evidence for Obstruction

38. Counts Three through Five of the indictment charged James Martin with obstruction of justice. These counts were based upon Martin's payment of

money to Ricci on three separate occasions: five hundred dollars on February 17 and March 26, and one thousand dollars on April 8, 1984. On appeal, Martin argues that the evidence presented at trial failed to establish beyond a reasonable doubt that Martin intended these payments to ensure Ricci's silence.

39. Martin contends that the evidence concerning his intent is ambiguous, and that the payments were merely loans advanced to his friend and neighbor, Albert Ricci. Our review of the evidence, viewed in the light favorable to the government, convinces us that the jury could have reasonably found that Martin's payments were intended to prevent Ricci from testifying about Martin's participation in the extortion conspiracy. The record is replete with offers by Martin to arrange to get Ricci a job, to support Ricci while he served time in prison, and to pay for Ricci's legal fees. Martin's admission that he owes Ricci financial support because Ricci is "going to bat for him" and that Ricci could expect this support only if Martin retained his freedom and Ricci kept his "mouth shut" supports the inference that these offers are not solely altruistic.

C. Claims Initially Raised by Linso

Sufficiency of the Evidence to Convict Linso of Participation and Conspiring to Participate in RICO Enterprise

40. Linso argues that while the testimony sufficed to show that he received protection payments, he lacked "knowledge about the essential nature of the conspiracy," and the government failed to show his "agreement to participate in the conduct and affairs of the enterprise" or his commission of "an overt act in furtherance of the conspiracy." Linso was the captain of the Fifth District under Inspector DePeri. Alvaro

testified that after DePeri originally chastised Linso for "fooling around with the machines," DePeri reconsidered his position and told Linso that "he could do what he wanted with the machines." Ricci testified that he delivered Linso's money directly to him at the Fifth District headquarters "maybe four or five times" and on two occasions had delivered money to Linso after Linso had been transferred from the Northwest Division. Ricci also testified that he and Linso had discussed the names of vendors who could "hurt him if they testified against him" before the grand jury. Donald DeVore, a video poker machine vendor, testified that he met with Linso at the Fifth District headquarters and discussed the number of machines he had in Linso's district, and the size and manner of protection payments for those machines. Viewed in the light most favorable to the government, we believe that the jury could have reasonably found that Linso understood the nature of the larger enterprise he was involved in, agreed to participate in that enterprise, and did indeed participate.

The Government's use of a Chart During its Opening Statement

41. Linso maintains that the use of a chart by the government in its opening statement deprived him of his right to a fair trial. He suggests that the chart linked him to the conspiracy before evidence concerning the conspiracy had been introduced. We disagree.

42. The opening statement is not evidence in itself, but serves "to give the jury the broad outlines of the case to enable the jury to comprehend it." *Government of the Virgin Islands v. Turner*, 409 F.2d 102, 103 (3d Cir. 1969). As long as the opening statement avoids references to matters that cannot be

proved or would be inadmissible, there can be no error, much less prejudicial error. *See Maxworthy v. Horn Electric Service, Inc.*, 452 F.2d 1141, 1143-44 (4th Cir. 1972). To begin, we take notice that such charts are often employed in complex conspiracy cases to provide the jury with an outline of what the government will attempt to prove. The chart complained of in the instant case contained the names of the participants in the protection scheme, including the defendants, the dates they served in the Philadelphia Police Department, and the divisions in which they served. After considering the arguments of the government and the defendants, the court permitted the use of the chart as a demonstrative aid to help the jury remember the names and positions of the defendants. We hold that the court did not abuse its discretion in allowing the government to use a visual aid in its opening statement. The use of a chart to preview the government's case certainly did not "poison the jury's mind" against the defendants, nor did it allude to "items of highly questionable evidence." *Turner*, 409 F.2d at 103.

Admission of Recorded Conversations Against Linso

43. Linso suggests that the trial court abused its discretion by admitting a recording of a telephone call in which Linso and Alvaro discussed the upcoming indictments. Linso argues that the tape should have been excluded on grounds of relevance and prejudice. We disagree. Linso displayed a cavalier attitude during the call, an attitude from which the jury could reasonably infer that Linso had failed to protest his guilt because he was culpable. Given Linso's counsel's insistence at trial that the jury hear the entire conversation, the sufficiency of the evidence apart from this tape to convict Linso, and the trial court's

instructions to the jury, after they had listened to the tapes, that references to indictments were not evidence, we find no abuse.

Admission of Goldsworthy's Statement Against Linso

44. Linso asserts that the trial court abused its discretion by admitting a statement by John Goldsworthy, a poker machine vendor, that he "understood" that the money he paid to Ricci would be going to "whoever was in that district." We disagree. Federal Rule of Evidence 801(c) defines hearsay as an out-of-court statement "offered in evidence to prove the truth of the matter asserted." We believe that Goldsworthy's statement was not hearsay because it was not offered to prove the truth of the statement, *i.e.*, that the protection money was actually going to all the Fifth District's officers. A more reasonable interpretation is that Goldsworthy testified as to his belief that he was paying protection money to the district rather than just to Ricci. Furthermore, we note that Linso's counsel neglected to pursue his objection and explore the basis for Goldsworthy's understanding on cross-examination. Under these circumstances, we find no abuse.

D. Claims Initially Raised by Morrell

Denial of Severance Motions by Morrell, Murphy, and Katz

45. Morrell contends that his resignation from the Philadelphia Police Department on March 29, 1983 terminated his association with the conspiracy as well. In accordance with department procedure, news of Morrell's resignation was sent over the department's teletype to all precincts. Captain Linso, Morrell's commanding officer and the only person in the conspiracy who knew about Morrell's involvement,

testified that he had read the teletyped report of Morrell's retirement. Given these facts, Morrell argues that he had shown that he had withdrawn from the conspiracy as a matter of law and was entitled to a severence from the trial of the other defendants.

46. The legal principles governing withdrawal are relatively clear. In *United States v. Continental Group, Inc.*, 603 F.2d 444, 467 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980), we observed that "'[m]ere cessation of activity in furtherance of the conspiracy is not sufficient to establish withdrawal'." Once the government establishes by a preponderance of the evidence a defendant's connection with a conspiracy, "[t]he defendant must present evidence of some affirmative act of withdrawal on his part, typically either a full confession to the authorities or communication to his coconspirators that he has abandoned the enterprise and its goals." *United States v. Steele*, 685 F.2d 793, 803 (3d Cir.) (citations omitted), *cert. denied*, 459 U.S. 908 (1982); *see United States v. United States Gypsum Co.*, 438 U.S. 422, 464-65 (1978). If the defendant makes this prima facie showing, the government must rebut the showing "either by impeaching the defendant's proof or by going forward with evidence of some conduct in furtherance of the conspiracy subsequent to the act of withdrawal." *Steele*, 685 F.2d at 804. Relying upon *Steele*, Morrell believes that his retirement notice satisfied this burden and required the government to present further evidence of his continuing involvement in the conspiracy. We disagree.

47. *Steele* concerned General Electric's attempt to win a construction contract through a bribery scheme. Naples, a General Electric employee, argued that he had withdrawn from the conspiracy by resigning from General Electric. In holding that Naples

had made a prima facie case of withdraw, we noted that Naples had presented evidence that he had permanently severed his employment relationship with General Electric. Termination of employment with General Electric in *Steele* sufficed to notify Naples's coconspirators that he had abandoned the enterprise and, necessarily, its goals and any claim to the conspiracy's benefits. Resignation from the police department in the instant case did not carry the same message. Morrell failed to introduce any evidence to show that this notice affirmatively disassociated him from his contacts in the department or the victims of the extortion scheme, nor did the teletype message communicate that Morrell had repudiated all claim to the conspiracy's benefits. Unlike *Steele*, the government presented evidence showing that continued employment was not a necessary prerequisite to participation in the conspiracy. Under these circumstances, we hold that Linso's knowledge of Morrell's resignation, by itself, does not constitute the affirmative break with the conspiracy required to establish a prima facie case of withdrawal.

48. Murphy and Katz raise the same issue. Our review of the record leads us to conclude that there is even less support for the proposition that these defendants withdrew from the conspiracy. Murphy resigned on November 11, 1982 and Katz on March 14, 1983. Neither man produced evidence of an act that communicated abandonment of the enterprise and its goals to the other members of the conspiracy other than the resignation itself. With respect to Murphy, there is evidence that he attempted to extort money from a video machine vendor after he resigned from the department. We therefore hold that neither Murphy nor Katz established a prima facie case of withdrawal that might have supported a severence motion.

Admission of Coconspirators' Statements Against Morrell, Murphy and Katz

49. Morrell, Murphy, and Katz maintain that the district court erred by permitting the admission of certain taped conversations recorded after they had allegedly withdrawn from the conspiracy. They argue that these tapes should not have been admitted against them because the court did not find specificially as to these appellants that the preponderence of the evidence established that they were coconspirators at the time of the recordings.

50. We have held previously that the government must establish by independent evidence the existence of an ongoing conspiracy and the connection of both the hearsay declarant and the defendant against whom the statement is offered to this conspiracy to trigger the coconspirator exception to the hearsay rule, Federal Rule of Evidence 801(d)(2)(E).[4] *See United States v. Inadi*, 748 F.2d 812, 816-17 (3d Cir. 1984), *cert. granted*, 53 U.S.L.W. 3838 (U.S. June 28, 1985); *United States v. Gibbs*, 739 F.2d 838, 843 (3d Cir. 1984) (in banc), *cert. denied*, 105 S. Ct. 779 (1985); *United States v. Ammar*, 714 F.2d 238, 245 (3d Cir.), *cert. denied*, 464 U.S. 963 (1983). Generally, the trial judgemakes a finding that the government has shown the conspiracy's existence by a preponderance of the evidence before the statement is admitted. *See United States v. Trowery*, 542 F.2d 623, 627 (3d Cir. 1976) (per curiam), *cert. denied*, 429 U.S. 1104 (1977). This practice ensures the reliability of the coconspirator's statements by linking the defendant to the conspiracy before the statements are admitted and prevents the

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4. More accurately, coconspirators' statements are not "hearsay exceptions" but are excluded from the definition of hearsay as a type of party admission. *See United States v. Ammar*, 714 F.2d 238, 255 (3d Cir.), *cert. denied*, 464 U.S. 963 (1983)

government from proving the conspiracy from the coconspirators' statements above. We recognize, however, that in complex trials involving a large amount of interrelated testimony, it may be necessary to admit the statements provisionally, subject to a later finding of a conspiracy established by the preponderance of independent evidence. *See United States v. Continental Group, Inc.*, 603 F.2d 444, 456-57 (3d Cir. 1979); *cert. denied*, 444 U.S. 1032 (1980).

51. In the instant case, the court exercised its discretion and admitted the recorded conversations subject to a later *Trowery* conspiracy finding. At the close of the government's case in chief, the trial court made a *Trowery* finding, prefacing its remarks by discussing the reasons why it could not rule that Morrell, Murphy, and Katz had made a prima facie case for withdrawal from the conspiracy. The court then went on to find that the evidence independent of the taped coconspirators' statements clearly established the existence of a conspiracy involving all of the defendants at the time of the conversations. Although we would have preferred a separate *Trowery* finding as to these appellants for the purposes of review, because the court made its *Trowery* finding immediately after dismissing appellants' withdrawal claims, we are compelled to hold that the court had reasonable grounds to find that Morrell, Murphy, and Katz were active participants in the conspiracy at the time of the conversations. *See Ammar*, 714 F.2d at 250.[5]

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5. We have repeatedly recognized that when the court denies a motion for acquittal on the conspiracy charge, the court's decision to send the case to the jury implies it has made a *Trowery* finding. *See Government of the Virgin Islands v. Dowling*, 633 F.2d 660, 665 (3d Cir. 1980); *United States v. Continental Group*, 603 F.2d 444, 457 (3d Cir. 1979). The rationale for this rule is that both the denial of an acquittal motion and the admission of

Coconspirators Statements "Not in Furtherance" of the Conspiracy

52. Alternatively, Morrell, Murphy, and Katz allege that certain portions of the recordings should not have been admitted under the coconspirators exception because the statements were not made "in furtherance of the conspiracy." These conversations, most of them between Alvaro and Martin, concerned the grand jury investigation, the selection of counsel, and the need for character witnesses. We have observed that the "in furtherance" requirement of Rule 801(d)(2)(E) is generally given a broad interpretion. *See Gibbs*, 739 F.2d at 845. In *Ammar* we said that statements that "provide reassurance, serve to maintain trust and cohesiveness among [the coconspirators], or inform each other of the current status of the conspiracy further the ends of the conspiracy." *Ammar*, 714 F.2d at 252. Although the tapes do not concern the central focus of the conspiracy, *i.e.*, the extortion of protection payments, they contain conversations between members of the conspiracy apprising one another of their efforts to avoid indictment and conviction. As such, we hold that these statements were made in furtherance of the conspiracy.

Sixth Amendment Confrontation Right

53. Morrell and Murphy contend that the admission of certain portions of tape recorded

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coconspirators' statements require the court to find that the government has shown the conspiracy and the defendants' connection to it by a preponderance of the evidence. *See Steele*, 685 F.2d at 804; *Trowery*, 542 F.2d at 627. Because the court denied these appellants' withdrawal motions, it would not have been necessary for the court to find explicitly that appellants had participated in the conspiracy after their resignation for the purposes of admitting the challenged coconspirators' statements against them.

conversations, again mainly between Alvaro and Martin, violated their sixth amendment right to confront witnesses against them. The cases they cite supporting this proposition, however, are inapposite. In *United States v. Smith*, 578 F.2d 1227 (5th Cir. 1978), the court excluded the recorded conversation of a person who was not a member of the conspiracy at the time he made the statements. *Id.* at 1233. Appellants concede that Martin was a member of the conspiracy at the time of the conversations. *Bruton v. United States*, 391 U.S. 123 (1968), addressed a situation where a nontestifying co-defendant's confession was introduced into evidence against him at a joint trial, accompanied by the court's cautionary instruction to the jury that they could consider the confession only against the confessing defendant. Despite these instructions, the Supreme Court held that the statement was inadmissible because the confession clearly implicated the nonconfessing co-defendant in the crime. We should first note that the confession in *Bruton* constituted hearsay evidence against the co-defendant. As we discussed above, the trial court properly admitted these tapes against Morrell and Murphy under the coconspirators' statements exception to the hearsay rule.

54. Although the Supreme Court has indicated that the coconspirators exception is narrower than the sixth amendment requires, *see Dutton v. Evans*, 400 U.S. 74, 82 (1970) (plurality opinion), neither the Supreme Court nor this one has ever equated the two. *See Gibbs*, 739 F.2d at 852 (Rosenn, J., dissenting); *Ammar*, 714 F.2d at 255. Our examination of the record shows that appellants did not suffer any prejudice from the introduction of the statements. Indeed, we do not believe that the statements are covered by *Bruton* at all. Appellants are mentioned only briefly in the conversations when Alvaro and Martin discussed who they thought would be indicted.

Nothing in the conversation supports an inference that either Alvaro or Martin knew that Murphy or Morrell were involved in the extortion scheme. *Cf. United States v. Ruff*, 717 F.2d 855, 856 (3d Cir. 1983), *cert. denied*, 464 U.S. 1051 (1984) (admission involving repeated references to defendant and detailing his substantial involvement in the crime charged held *Bruton* statements). Further, the trial court immediately instructed the jury that the indictment could not be construed as evidence of guilt. Under these circumstances, we hold that the introduction of the tapes did not violate appellants' sixth amendment confrontation right.[6]

Trial Court's Refusal to Give Morrell's Instruction

55. Morrell argues that the court erred by refusing to instruct the jury that it could not find Morrell guilty if they found that he acted as "a 'courier' or 'go-fer' for another defendant." In refusing to give the instruction, the court observed that it was confusing and that it incorrectly stated the law. We

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6. The Second Circuit interprets *Bruton* to hold that cautionary instructions are ineffective against hearsay statements when two conditions exist: (i) the statement by the nontestifying co-defendant is clearly inculpatory as to the defendant against whom it is offered and (ii) the statement is "vitally important to the government's case. *See United States v. Knuckles*, 581 F.2d 305, 313 (2d Cir.), *cert. denied*, 439 U.S. 986 (1978); *United States v. Wingate*, 520 F.2d 309, 313 (2d Cir. 1975), *cert. denied*, 423 U.S. 1074 (1976); *see also Dutton v. Evans*, 400 U.S. 74, 87 (1970) (admitting coconspirator's inculpatory statement and distinguishing *Bruton* because the statement held not to be "crucial" or "devastating."). Under this analysis, the court did not err in admitting the tapes against Morrell or Murphy. The cited portions of the tape do not clearly implicate either Morrell or Murphy in the conspiracy, nor are they even arguably central to the government's case against them.

agree. Section 1962(c) makes liable those persons who are "employed by or associated with" the RICO enterprise. This section draws no distinction between the foot soldier and the general: "the legislative intent was to make RICO violations dependent upon behavior, not status." *United States v. Forsythe*, 560 F.2d 1127, 1136 (3d Cir. 1977). "Thus, the RICO net is woven tightly to trap even the smallest fish, those peripherally involved in the enterprise." *United States v. Elliot*, 571 F.2d 880, 903 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978). It is no abuse of discretion to refuse to give a misleading instruction. *See United States v. George*, 625 F.2d 1081, 1087 (3d Cir. 1980).

E. Claims Initially Raised by Pecic

Denial of Pecic's Severance Motion

56. Pecic contends that because the taped conversations did not involve or mention him, and because he was tried with other, more "notorious" defendants, the court abused its discretion in refusing to grant his severance motion.

57. Federal Rule of Criminal Procedure 14 provides in pertinent part:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election of separate trials of counts, grant a severance of defendants or provide whatever relief justice requires.

Rule 14 places the burden of showing prejudice from the joinder on the defendant. *United States v. Lipowitz*, 407 F.2d 597, 601 n.15, *cert. denied*, 395 U.S. 946 (1969). We will reverse the district court's decision to deny a Rule 14 severance motion only on a

showing of abuse of discretion. *United States v. Boyd*, 595 F.2d 120, 125 (3d Cir. 1978); *United States v. Somers*, 496 F.2d 723 (3d Cir.), *cert. denied*, 419 U.S. 832 (1974). Pecic thus faces the "heavy burden" of showing the trial judge exceeded the bounds of his discretionary authority. *Boyd*, 595 F.2d at 125.

58. We cannot say that Pecic meets this burden. "A defendant is not entitled to severance merely because the evidence against a co-defendant is more damaging than against him." *United States v. Dansker*, 537 F.2d 40, 62 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). Our review of the record and our discussion below of Katz's "spillover" claim lead us to conclude that the evidence was cogently presented and that the jury was able to "compartmentalize" the evidence against Pecic. *See Dansker*, 537 F.2d at 62.

Refusal to Produce Requested Evidence

59. Pecic asserts that the government's non-production of information in its possession concerning poker machine vendors who did not admit to being extorted violates *Brady v. Maryland*, 373 U.S. 83 (1963). *Brady* requires that the government provide a defendant with exculpatory, material evidence in its possession prior to the commencement of trial. *See generally United States v. Higgs*, 713 F.2d 39, 41-42 (3d Cir. 1983), *cert. denied*, 464 U.S. 1048 (1984). The requested information is neither exculpatory nor material to Pecic's defense, however. Even if we conceded that this evidence were somehow exculpatory, it is not material, as we do not believe that "the suppressed evidence might have affected the outcome of the trial." *United States v. Agurs*, 427 U.S. 97, 104, (1976). Evidence that not all vendors were extorted is irrelevant to the charge that defendants conspired to extort and did extort protection payments from certain vendors. *Cf. United States v. Harrison*,

679 F.2d 942, 948-49 (D.C. Cir. 1982) (evidence that certain witnesses had not purchased drugs from defendant did not undercut government's case).

F. Claim Initially Raised by Katz

Spillover of Evidence Introduced Against Co-defendants

60. Katz argues that *Kotteakos v. United States*, 328 U.S. 750 (1946), and *United States v. Camiel*, 689 F.2d 31 (3d Cir. 1982), require this court to vacate his sentence. Katz asserts that the alleged variance between the multiple conspiracies charged in the indictment and the single conspiracy proved at trial allowed the government to introduce evidence unrelated to the conspiracy proved. This may be a "classic" spillover theory, *see United States v. Schurr*, ___ F.2d ___, ___, slip op. at 15 (3d Cir. Oct. 30, 1985), but because we find no variance between the RICO conspiracy charged and the one proved at trial, it is irrelevant. The existence of a variance is a prerequisite to our determination that the allegedly improper evidence materially prejudiced Katz's trial. *See Schurr*, ___ F.2d at ___, slip op. at 15; *Camiel*, 689 F.2d at 35.

61. Katz's spillover argument is better understood as alleging prejudicial joinder of defendants, *i.e.*, that the jury was unable to separate the evidence relevant to Katz from the evidence introduced against the other defendants and thus did not render a fair verdict as to Katz. In particular, Katz maintains that the quantity and manner of presentation of the taped conversations admitted against the other defendants might have confused the jury to the extent that the jury transferred guilt from his co-defendants to Katz. Thus, we will analyze Katz's spillover claim as an appeal of the denial of his pre-trial severance motion.

62. As we noted in our discussion of Pecic's severance motion, a defendant is not entitled to severance merely because the government's evidence against his co-defendant is stronger than its evidence against him. Although we are sensitive to the dangers presented by joinder, *see, e.g., State ex rel. Whitman v. Fox*, 160 W. Va. 633, ___, 236 S.E.2d 565, 527-73 (1977), we also believe that good reasons support the general rule that persons charged with conspiracy should be tried together. *See United States v. Jackson*, 549 F.2d 517, 523 (8th Cir.), *cert. denied*, 430 U.S. 985 (1977). Chief among these is the conservation of public resources that would be lost if the same evidence were presented at separate trials and the decreased possibility of prejudice where the evidence against each defendant is strong. *See United States v. Lane*, 584 F.2d 60, 65 (5th Cir. 1978).

63. Federal Rule of Criminal Procedure 14 requires the trial court to balance the public interest considerations in a joint trial against the possibility of prejudice inherent in the joinder of defendants. Our scope of review of the court's denial of a motion for severance is limited: "the district court's denial of such a motion will not be disturbed absent an affirmative showing that the court's ruling resulted in such prejudice to the moving party that it amounted to an abuse of discretion." *Dansker*, 537 F.2d at 61, *citing United States v. De Larosa*, 450 F.2d 1057 (3d Cir. 1971), *cert. denied*, 405 U.S. 927 (1972). The proper question on appeal is whether the jury could have been reasonably expected to compartmentalize the allegedly prejudicial evidence in light of the quantity and limited admissibility of the evidence. *See Dansker*, 537 F.2d at 62; *United States v. Serubo*, 460 F. Supp. 689, 694 (E.D. Pa. 1978), *vacated on other grounds*, 604 F.2d 807 (3d Cir. 1979).

64. We do not believe that Katz has met his burden. Our review of the record shows that the evidence was presented in a clear fashion and that the court carefully instructed the jury as to the manner in which the evidence could be considered. Moreover, the record reveals that all counsel, including Katz's, were alert to the possibility of prejudice from the introduction of the tapes, and ensured that the court gave limiting instructions where necessary. Consequently, we believe that Katz's allegation of prejudice through the transference of guilt between defendants here is speculative and as such, meritless. *See Opper v. United States*, 348 U.S. 84, 95 (1954).

III.

65. After careful consideration of defendants' arguments and a thorough examination of the record, we are of the opinion that there is no merit to any of the issues raised on this appeal. Accordingly, we will affirm the judgment of the district court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES OF AMERICA

vs.

MURPHY, THEODORE

Theodore Murphy, Appellant in 84-1594

UNITED STATES OF AMERICA

vs.

KATZ, GEORGE

George Katz, Appellant in 84-1599

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
D.C. Criminal Nos. 84-00106-02, 84-00106-01A,
84-00106-03, 84-00106-04, 84-00106-05,
84-00106-06, 84-00106-07

Present: ADAMS, HUNTER, Circuit Judges, and STERN,* District Judge

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel October 15, 1985. On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court entered September 28, 1984, and appealed at Nos. 84-1579, 84-1594 and 84-1599 and the judgments of the said District Court entered October 1,

1984, and appealed at Nos. 84-1566, 84-1571, 84-1577 and 84-1578, be, and the same are hereby affirmed.

ATTEST:

Clerk

December 6, 1985

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* Honorable Herbert Stern, United States District Judge for the District of New Jersey, sitting by designation

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

VS. NO. 84-00106-07

GEORGE KATZ

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person on this date, September 24, 1984 with counsel, Timothy J. Savage, Esq.

There being a verdict of Guilty the defendant has been convicted as charged of the offenses of conspiracy to participate in and the participation in the affairs of an enterprise, the activities of which affect interstate commerce, through a pattern of racketeering; Hobbs Act extortion, aiding and abetting in violation of 18 USC § 1962(d); §1962(c); §1951 and §2.

Sentence or Probation Order: As to counts 1, 2, and 38: The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of EIGHT (8) YEARS under counts 1, 2 and 30. The terms of imprisonment herein imposed shall run concurrently with each other and with the term of imprisonment imposed under count 1. Under count 48, the imposition

of sentence is suspended, and the defendant is placed on probation for a period of THREE (3) YEARS to run consecutively with the terms of imprisonment imposed above.

In addition to the special conditions of probation imposed above it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders committment to the custody of the Attorney General and recommends:

2 copies U.S. Marshal

1 copy U.S. Attorney (H.B. Klein, AUSA)

1 copy U.S. Probation

A TRUE COPY CERTIFIED THIS
24TH day of September 1984

By: _____
Francis E. DeVine, Deputy Clerk

_____
Daniel H. Huyett, 3rd, J.
9-24-84

APPENDIX C
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-1566, 84-1571, 84-1577, 84-1578
84-1579, 84-1594, 84-1599

UNITED STATES OF AMERICA

vs.

DE PERI, JOSEPH

Joseph DePeri, Appellant in 84-1566

UNITED STATES OF AMERICA

vs.

MARTIN, JAMES

James Martin, Appellant in 84-1571

UNITED STATES OF AMERICA

vs.

LINSO, DENNIS

Dennis Linso, Appellant in 84-1577

UNITED STATES OF AMERICA

vs.

MORRELL, GEORGE

George Morrell, Appellant in 84-1578

Nos. 84-1566, 84-1571, 84-1577, 84-1578, 84-1579, 84-1594 and 84-1599
Page 2

UNITED STATES OF AMERICA

vs.

MURPHY, THEODORE

Theodore Murphy, Appellant in 84-1594

UNITED STATES OF AMERICA

vs.

KATZ, GEORGE

George Katz, Appellant in 84-1599

SUR PETITION FOR REHEARING

Present: ALDISERT, Chief Judge, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON and MANSMANN, Circuit Judges

The petition for rehearing filed by

GEORGE KATZ, APPELLANT IN 84-1599

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service,

and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/J.H.

James Hunter, III, Judge

Dated: January 9, 1986

Supreme Court, U.S.
FILED
MAY 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1538

In the Supreme Court of the United States

OCTOBER TERM, 1985

GEORGE KATZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

PATTY MERKAMP STEMLER
Attorney

Department of Justice
Washington, D.C. 20530
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QUESTIONS PRESENTED

1. Whether the court of appeals properly upheld the admission of co-conspirator declarations without first determining that they were reliable.

2. Whether out-of-court statements of petitioner's co-conspirators were made in furtherance of the conspiracy.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1538

GEORGE KATZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 778 F.2d 963. The opinion of the district court denying posttrial motions (*United States* v. *Martin*, Crim. No. 84-106 (E.D. Pa. Sept. 12, 1984)) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 42a-43a) was entered on December 6, 1985. A petition for rehearing was denied on January 9, 1986 (Pet. App. 46a-48a). The petition for a writ of certiorari was filed on March 10, 1986. The jurisdic-

tion of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of racketeering, in violation of 18 U.S.C. 1962(c); racketeering conspiracy, in violation of 18 U.S.C. 1962(d); and extortion, in violation of the Hobbs Act, 18 U.S.C. 1951. Petitioner was sentenced to concurrent terms of eight years' imprisonment on the two racketeering counts and on one of the Hobbs Act counts. A consecutive term of three years' probation was imposed on the remaining Hobbs Act count. The court of appeals affirmed (Pet. App. 1a-41a).

1. The evidence at trial showed that from late 1979 through 1984, many top-ranking members of the Philadelphia Police Department operated a scheme to extort protection payments from numbers operators and vendors of illegal video poker machines throughout Philadelphia. The members of the conspiracy ranged from Deputy Commissioner James Martin, the second-ranking official in the Department, to officers on the beat. Petitioner, a lieutenant in the Department, collected $575 per month from numbers writer Lester Barry. He also collected payments from poker machine vendor William Dawley. Petitioner kept a portion of the money and turned over the remainder to Joseph DePeri, the inspector in charge of the Northwest Police Division. DePeri explained to his vice lieutenant, Joseph Alvaro, that he was permitting petitioner to pick up the payoffs from several operations in the Northwest Division so that petitioner could make extra money for himself

(C.A. App. 1259a-1261a, 1272a-1273a, 2052a-2053a, 2833a).[1]

Petitioner resigned from the force in March 1983 after learning that his personnel records had been subpoenaed by a federal grand jury. The following year, Alvaro was cooperating with the government in the investigation and had discussions with DePeri and Deputy Commissioner Martin. Those discussions were recorded with Alvaro's consent. The men discussed the destruction of records pertaining to the extortion scheme. They also discussed the payment of "hush money" to Al Ricci, who had been collecting payoffs for the members of the Department. Through Alvaro, Martin promised not only to pay "hush money" to Ricci, but also to pay Ricci's prospective tax liabilities up to $40,000, and his legal fees up to $50,000 (C.A. App. 1607a, 1615a, 1623a-1624a, 1640a, 2188a-2191a, 2198a-2200a, 2404a-2405a). In one conversation between Alvaro and DePeri, there was a fleeting reference to petitioner as one of the police officers who would be indicted; otherwise the conversations did not refer to petitioner at all (C.A. App. 2287a-2290a). All of the taped discussions that were played at trial took place on or before March 25, 1984 (C.A. App. 2404a-2405a). The extortion of payoffs from numbers writers continued into April 1984 (C.A. App. 2019a-2020a).

2. On March 8, 1984, petitioner and 12 other present and former police officers were named in a 57-count indictment charging Hobbs Act and RICO violations. Two months later, an 86-count superseded-

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[1] Our statement of facts is taken from the brief filed by the government in the court of appeals. The citations to "C.A. App." refer to the appendix that was filed in that court.

ing indictment was returned adding three defendants and obstruction of justice charges against Martin and DePeri. The obstruction charges were also embraced in the RICO conspiracy count.

At trial, petitioner objected to the admission of the taped conversations between Alvaro and codefendants DePeri and Martin on the ground that he had withdrawn from the conspiracy the previous year when he resigned from the Police Department. He therefore claimed that he was no longer a member of the conspiracy when the obstruction of justice took place. The district court held that petitioner's mere resignation from the police force was insufficient to constitute withdrawal from the conspiracy as a matter of law. The court submitted the issue of withdrawal to the jury with appropriate instructions (C.A. App. 4449a-4451a). The court also directed the jury to disregard any evidence against a defendant that occurred after the date the defendant withdrew from the conspiracy, if he withdrew at all (C.A. App. 4450a).

In its opinion denying various posttrial motions, the district court rejected an argument that the Confrontation Clause required exclusion of Martin's tape-recorded statements. The court applied the rule of *United States* v. *Ammar*, 714 F.2d 238, 255 (3d Cir.), cert. denied, 464 U.S. 936 (1983), that an out-of-court statement "must bear 'sufficient indicia of reliability' to demonstrate its trustworthiness" (*United States* v. *Martin*, Crim. No. 84-106 (E.D. Pa. Sept. 12, 1984) (quoting *Ammar*, 714 F.2d at 255)). The court found it "beyond dispute that the statements are sufficiently reliable, since they are actually the words of defendant Martin himself" (*United States* v. *Martin*, Crim. No. 84-106 (E.D. Pa. Sept. 12, 1984)).

3. On appeal, petitioner claimed that Alvaro's taped conversations with DePeri and Martin were not admissible as co-conspirator declarations under Fed. R. Evid. 801(d)(2)(E) because they were not made in furtherance of the conspiracy and were made after petitioner withdrew from the conspiracy (Katz Br. 27-30). Two other defendants, whose arguments Katz adopted by reference, argued that admission of the taped conversations violated the Confrontation Clause because the tapes were made after they had withdrawn from the conspiracy (Morrell Br. 43-45; Murphy Br. 45-47). No defendant argued that the Confrontation Clause was violated on the ground that the statements were unreliable.

The court of appeals found that, although petitioner had resigned from the Department in March 1983, he produced no evidence showing that he had abandoned the enterprise or that he had communicated his abandonment to his co-conspirators. The court noted that some police officers who resigned during the grand jury investigation continued to collect payoffs from the vendors and numbers operators after their resignations. Thus, there was no reason to equate the mere act of resigning from the Department with withdrawal from the conspiracy. Pet. App. 31a. The court then concluded that the taped conversations were properly admitted against petitioner because the district court had reasonable grounds to find that petitioner was an active participant in the conspiracy at the time of the conversations (*id.* at 33a).

The court further held that the DePeri and Martin statements were made in furtherance of the conspiracy (Pet. App. 34a). To the extent that Martin discussed the grand jury investigation, the selection of

counsel, and the need for character witnesses in his conversations with Alvaro, he sought to further the ends of the conspiracy by providing reassurance to a co-conspirator and informing that co-conspirator of the current status of the conspiracy (*ibid.*).

The court specifically rejected the Confrontation Clause argument made by Morrell and Murphy (Pet. App. 34a-36a). In addition to rejecting the claim on the merits, the court concluded that "appellants did not suffer any prejudice from the introduction of the statements" (*id.* at 35a).

ARGUMENT

1. Petitioner now claims (Pet. 9) that the admission of Alvaro's taped conversations with DePeri and Martin violated his Sixth Amendment right of confrontation because the court of appeals failed to apply the "reliability test" to these statements, as was required by its own decision in *Ammar*, 714 F.2d at 255-256. The court of appeals, however, had no occasion to inquire into the reliability of the recorded statements, because no defendant challenged the district court's conclusion that they were reliable. Nor does petitioner do so even now.[2]

The Third Circuit has held that co-conspirator statements admissible under Fed. R. Evid. 801(d)

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[2] Both courts below found that the statements were made by members of the conspiracy, during the course of the conspiracy, and in furtherance of the conspiracy. Petitioner does not suggest what additional indicia of reliability are needed in order to admit a co-conspirator declaration. Nor does he suggest that the particular statements at issue in this case were unreliable. In these circumstances, there is no reason for the Court to address the purely hypothetical question posed by petitioner.

(2)(E) do not automatically satisfy the Confrontation Clause, but must also be assessed for "indicia of reliability" (*Ammar*, 714 F.2d at 255-256). This is the very rule for which petitioner contends. Had he asked the Third Circuit to determine whether there were such indicia of reliability in this case, it would have been required by its own precedent to do so. Having made no such request, he cannot complain of the court's failure to address the issue. See *United States* v. *Gibbs*, 739 F.2d 838, 846-848 (3d Cir. 1984) (en banc).[3]

2. Petitioner also challenges (Pet. 10-11) the finding of the court of appeals that the taped statements of DePeri and Martin were made "in furtherance of the conspiracy." Citing *Dutton* v. *Evans*, 400 U.S. 74, 81 (1970); *Lutwak* v. *United States*, 344 U.S. 604 (1953); and *Krulewitch* v. *United States*, 336 U.S. 440 (1949), petitioner argues that these statements did not fall within the co-conspirator exception to the hearsay rule (Fed. R. Evid. 801(d)(2)(E)) because they were made during the "concealment phase" of the conspiracy. There is neither a legal nor a factual basis for petitioner's claim.

Petitioner has conflated two distinct requirements of Rule 801(d)(2)(E). One requirement is that the statement be made "in furtherance of the conspiracy" (see 4 D. Louisell & C. Mueller, *Federal Evidence* § 427, at 347-357 (1980)). The court of appeals

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[3] If a "reliability" issue had been properly raised before the court of appeals, it would not be reasonable to infer from the court's silence, as petitioner suggests (Pet. 9), that the panel had sub silentio overruled *Ammar*. A far more reasonable inference would be that the court of appeals had found the district court's reliability determination to be so clearly correct as not to warrant discussion.

correctly relied on its own decision in *Ammar*, 714 F.2d at 252, for the proposition that statements such as those made by DePeri and Martin are "in furtherance" of the conspiracy. See also *United States* v. *Inadi*, No. 84-1580 (Mar. 10, 1986), slip op. 2-3 (statements made by co-conspirators about the police investigation of their crime were admitted as statements made in furtherance of the conspiracy).

A separate requirement, addressed in *Lutwak* and *Krulewitch*, is that the statement be made "during the course" of the conspiracy (see 4 D. Louisell & C. Mueller, *supra*, § 427, at 337-347). In *Lutwak* and *Krulewitch*, this Court held that out-of-court statements of a conspirator are inadmissible in a federal conspiracy trial if the statements are made after the conspiracy has ended and "during a subsequent period when the conspirators were engaged in nothing more than concealment of the criminal enterprise" (*Dutton* v. *Evans*, 400 U.S. at 81 (opinion of Stewart, J.)). In this case, however, the conspiracy had not ended when Alvaro conversed with DePeri and Martin in February and March 1984. On the contrary, members of the Department were still extorting protection payments until April 1984, and Martin was using some of the extorted money to buy Ricci's silence. Thus, the obstruction of justice occurred during the course of the extortion conspiracy. Both crimes, in turn, formed the basis of the racketeering conspiracy charge.

In any case, petitioner was not prejudiced by the admission of the recorded statements. Petitioner's Hobbs Act and racketeering convictions were firmly based on the undisputed testimony of the two men from whom petitioner collected protection payments. His convictions did not rest in any way on the con-

versations that were recorded in 1984, from which the jury learned nothing more about petitioner than that other defendants expected him to be indicted.[4] In these circumstances, where the taped conversations did not contribute to petitioner's convictions, his substantial rights were not affected by the admission of that evidence, and there is no reason to review his hearsay claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[4] Of course, by virtue of petitioner's presence at trial, the jury knew that he had been indicted, and therefore it learned nothing new from that portion of the recorded statements. Indeed, this excerpt was not admitted to prove the truth of the matter asserted, namely, that petitioner would be indicted. Accordingly, the statement was not hearsay to begin with (Fed. R. Evid. 801(c)). Furthermore, because the district court charged the jury that an indictment should not be considered as evidence of guilt (C.A. App. 2441a-2442a), petitioner surely suffered no prejudice from this fleeting reference to his name in the taped conversations.

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